Supreme Court, U. S.
FILED
MAY 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

77-1700

WESTPORT TAXI SERVICE, INC.,
MICHAEL AND ANTHONY GILBERTIE, *Petitioners,*

v.

BROCK ADAMS, SECRETARY OF TRANSPORTATION, WESTPORT TRANSIT DISTRICT, PAUL R. GREEN, JOHN E. MEYERS, AND RICHARD BRADLEY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Westport Taxi Service, Inc., Michael Gilbertie and Anthony Gilbertie pray that a writ of certiorari issue to review that portion of the opinion and judgment of the United States Court of Appeals for the Second Circuit, entered January 24, 1978, affirming, in part, the judgment of the United States District Court for the District of Connecticut which denied petitioners' action to enjoin the implementation of a demonstration grant funding a municipal taxi service financed under the Urban Mass Transportation Act of 1964.

OPINIONS BELOW

Petitioners' complaint for preliminary and permanent injunctive relief was originally denied by the United States District Court for the District of Connecticut in an unreported opinion [App. A, p. A-1-A-17], entered on April 13, 1977. This decision was affirmed in part, reversed in part, and remanded with instructions by the United States Court of Appeals for the Second Circuit in an opinion [App. B, p. A-18-A-30] reported at 571 F.2d 697 (1978), rehearing denied on February 28, 1978 [App. C, p. A-31].

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1978, and petitioners' timely motion for rehearing was denied on February 28, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Petitioner Westport Taxi Service, Inc., a private taxi company consisting of five taxi cabs owned and operated by brothers Michael and Anthony Gilbertie under a certificate of public convenience from the State of Connecticut, brought this action for an injunction, declaratory judgment and other relief as a result of the decision of the respondent Secretary of Transportation awarding a $610,000.00 "demonstration" grant, pursuant to the Urban Mass Transportation Act of 1964, 49 U.S.C. §1601 *et seq.* [The Act] to respondent Westport Transit District, a municipal transit body, for implementation of a federally subsidized municipal taxi service.

The respondent Transit District is utilizing the grant to finance the operating costs and capital expenditures of a shared-ride taxi service in Westport, Connecticut. The Transit District's municipal taxi service directly competes with petititioners' business, offering essentially the same services. Section 1602(e) of the Act explicitly prohibits federal funding to a local public body for creation of mass transportation services "in competition with, or supplementary to" the services provided by an existing "mass transportation company" unless the Secretary of Transportation makes findings that, among other things, the program provides to the maximum extent feasible for the participation of existing private mass transportation companies or that such existing companies are compensated for any acquisition of their property, as required by applicable state and local law. 49 U.S.C. §1602(e). The Secretary of Transportation did not make these findings, nor did The Transit District include participation by petitioners' taxi service in its federally funded municipal taxi service.

The court of appeals held that §1602(e) findings under the Act were not required because petitioners' taxi company was not a "mass transportation company" within the meaning of the Act.

The questions presented are:

1. Whether petitioners' taxi service is a company engaged in "mass transportation," which is defined under the Act as "transportation by bus, rail or other conveyance, either publicly or privately owned, which provides general or special services (excluding school buses or charter of sightseeing services) on a regular and continuing basis," thereby requiring administrative findings pursuant to §1602e of the Urban Mass Transportation Act?

2. Whether the implementation of a federally funded competitive municipal taxi service, without findings pursuant to 49 U.S.C. §1602(e), violates petitioners' federal statutory right to be free of "unlawful" competition and therefore constitutes a taking by the Federal Government and the Westport Transit District without just compensation in violation of the Fifth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . ."

Constitution of the United States, Amendment XIV, §1:

". . . nor shall any state deprive any person of life, liberty or property without due process of law . . ."

42 U.S.C. §1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

49 U.S.C. §1602(d)

Any application for a grant or loan under this chapter to finance the acquisition, construction, reconstruction or improvement of facilities or equipment which will substantially affect a community or its mass transportation service shall include a certification that the applicant —

(1) has afforded an adequate opportunity for public hearings pursuant to adequate prior notice, and has held such hearings unless no one with a significant economic, social or environmental interest in the matter requests a hearing;

(2) has considered the economic and social effects of the project and its impact on the environment; and

(3) has found that the project is consistent with official plans for the comprehensive development of the urban area.

Notice of any hearings under this subsection shall include a concise statement of the proposed project, and shall be published in a newspaper of general circulation in the geographic area to be served. If hearings have been held, a copy of the transcript of the hearings shall be submitted with the application.

49 U.S.C. §1602(e)

(e) No financial assistance shall be provided under this chapter to any state or local public body or agency thereof for the purpose, directly or indirectly, of acquiring any interest in, or purchasing any facilities or other property of, a private mass transportation company, or for the purpose of constructing, improving, or reconstructing any facilities or other property acquired (after July 9, 1964) from any such company, or for the purpose of providing by contract or otherwise for the operation of mass transportation facilities or equipment in competition with, or supplementary to, the service provided by an existing mass trans-

portation company, unless (1) the Secretary finds that such assistance is essential to a program, proposed or under active preparation, for a unified or officially coordinated urban transportation system as part of the comprehensively planned development of the urban area, (2) the Secretary finds that such program, to the maximum extent feasible, provides for the participation of private mass transportation companies, (3) just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws, and (4) the Secretary of Labor certifies that such assistance complies with the requirements of Section 1609(c) of this title.

Connecticut General Statute §7-273e:

[Acquisition or establishment of transit system and transportation center by district. Eminent domain]

(a) If the directors deem it necessary to preserve or to develop a transit system, the district may establish, operate and maintain a transit system within the district or between the district and any municipality contiguous with its service area with which it contracts to furnish transit service, and for this purpose may establish a new system, or may acquire all or a portion of the property and franchises of any company or companies operating a transit service in the district, including that portion of the property and franchise which is used outside the district but which is integrated into the service provided in the district. The district may establish, construct, acquire, operate and maintain a transportation center, as defined in subsection (b) of section 7-273b, in the district, and for such purposes may acquire, by purchase or otherwise, hold, sell, convey and obtain and exercise any and all

rights of ownership or interest in or to any real or personal property as provided by this section, apply for and accept grants and gifts, lease all or any portion of such center, charge and collect rent, use or other fees, make contracts and enter into management agreements and arrangements with others with respect to any transaction, operation or venture which the district has the power to conduct by itself in connection with exercising its powers under this section. Thereafter the district may contract, after competitive bidding, for the operation of all or any portion of the system and any transportation center located therein by private management, under suitable incentives. The district shall fix the terms and conditions upon which transit services shall be provided, whether operated directly by the district or indirectly by contract, including the fixing of passenger fares and any other rates to be charged. The district shall, for its purposes under this section, so far as applicable, have the authority conferred on the public utilities control authority by the general statutes as applied to local transit.

(b) In order to insure the continuance of adequate transit services when it appears that the holder of the franchise is or will be incapable of continuing to offer satisfactory service to meet present or future public passenger transportation requirements and it is improbable that such franchise will be sought by any other private concern, the public utilities control authority, on its own initiative, may or, on request of the transit district or the legislative body of one or more municipalities in the area served, shall fix a time and place for a hearing as to whether such franchise is suitable for acquisition by a transit district. Said au-

thority shall give written notice of such hearing to the board of selectmen of each town, or in the case of cities and boroughs to the chief executive of each, within the area not less than fourteen days prior to such hearing, and shall cause to be published twice, not more than fourteen nor less than seven days prior to such hearing, notice of such hearing in a newspaper or newspapers having a substantial circulation in each municipality within such area. Suitability of a franchise for acquisition by a transit district shall be determined from the following considerations:

(1) That public convenience and necessity require the continuance of transit service within the area,

(2) that the present franchise holder is or will be incapable of continuing to offer satisfactory service,

(3) that it is improbable that such franchise will be sought by a private concern and

(4) that continuance of transit service may require the operation of such service by a transit district.

After a public hearing thereon and consideration of the above-mentioned factors, the public utilities control authority may declare such franchise suitable for acquisition by a transit district, provided such declaration shall not affect the authority of the municipalities in the area to establish such a district. Ability to offer satisfactory service shall be based upon the financial stability of the franchise holder as determined from past, current and projected net income and from an estimate of financial ability to meet future public passenger transportation requirements in the area. The public utilities control authority may

make periodic inspections of transit system franchise holders to determine the financial stability of each and for this purpose may examine the books, accounts and other pertinent documents by the issuance of a subpoena.

(c) A transit district shall have the power to acquire real property and interests and rights in real property by eminent domain in the name of the transit district for the purposes of the transit district subject to the prior approval of the legislative body or bodies of the municipality or municipalities in which the real property is located. The owner shall be paid by the transit district for all damages. Where the transit district and the owner of such property cannot agree upon the amount to be paid to the owner for any property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8-129 to 8-133, inclusive. Where the public utilities control authority has determined that a franchise is suitable for acquisition pursuant to subsection (b) of this section, the transit district shall have the power to acquire by eminent domain all or any part of the franchise and of the holder's transit system, including the holder's real estate or interests therein, personal property, and funds under the control or held for the use of or the benefit of such holder. Where the the transit district and the holder of such franchise and property cannot agree upon the amount to be paid to the holder for any franchise or property thus taken, the transit district shall proceed in the same manner specified for redevelopment agencies in accordance with sections 8-129 to 8-133, inclusive.
(1975, P.A. 75-486, §25, eff. Dec. 1, 1975; 1977, P.A. 77-463, §2.)

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

Petitioners Michael and Anthony Gilbertie own and operate petitioner Westport Taxi Service, Inc., a private taxicab-business licensed by the Connecticut Public Utilities Control Authority to provide taxi service to the Westport, Connecticut area. Petitioners' father purchsed the business 22 years ago for $35,000.00, and the Gilbertie family has operated the business since.

In February 1976, respondent Westport Transit District, a municipal body of the Town of Westport, Connecticut, applied for federal funding from the Urban Mass Transportation Administration (UMTA) to establish a federally subsidized, municipally operated taxi service in the Westport area in direct competition with petitioners' business.

On June 29, 1976, UMTA approved a two-year demonstration grant to the Transit District in the amount of $610,000.00 for implementation of the proposed taxi system, which, at the time, included specific provisions for "premium" as well as "shared-ride" taxi service.[1] [UMTA approval of $610,000.00 grant, App. D, p. A-9; R.B. 25,* App. L, p.A-76] Only after this law suit was commenced, was the premium ride aspect removed from the UMTA funding.

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* References are to the trial testimony of Richard Bradley [R.B.], Executive Director of the Westport Transit District and Michael Gilbertie [M.G.], Vice-President of Westport Taxi Service, Inc.

1 "Shared ride," as used in this petition, describes a taxi service rendering service to two or more paying passengers traveling to different locations.

Although the grant was to be used to acquire equipment to compete directly with petitioners' exisitng taxi company, the UMTA approval did not contain findings by the Secretary of Transportation, as required under §1602(e) of the Act, that such financial assistance provided for participation to the maximum extent feasible of existing private mass transportation companies in the project or that just and adequate compensation would be paid under applicable state and local law for any taking of the mass transportation company's property or franchise rights. [UMTA approval of $610,000 Grant, App. D, p.A-9]

The Gilberties, but not Westport Taxi itself, were approached with the suggestion that they become employees of the district as dispatchers [R.B. 49, App. L, P.A-80]. However, no concrete offer was ever made to the Gilberties. The District made clear that Westport Taxi's operations would be superseded by the District's own "transportation company," and the District, not the Gilberties, would have ultimate responsibility for management and control of the project [R.B. 48, 50, App. L, p.A-81]. Thus, the District would have final control of rates, salaries and routes [R.B. 46-7 App. L, p.A-80]; the District would own all vehicles and equipment and contract for repairs [R.B.45 App. L, p.A-79]; the District would collect all revenues [R.B. 45, App. L, p.A-79]. The Gilberties would be deprived of their position as independent taxi operators, and their business would be effectively destroyed.[M.G. 80, App. M, p.A-86]. At no time did the

District offer to compensate the Gilberties for the diminution of the value of their existing franchise and its attendant good will. [M.G. 80, App. M, p.A-86; R.B. 49, A.. L, p. A-80]

At the time suit was commenced, Westport Taxi had a fleet of five taxi cabs serving Westport, Connecticut, a town of less than 30,000 people.[2] Petitioners' company provided premium or exclusive ride service as well as shared-ride service pursuant to Connecticut Public Utility Control Authority regulation section 16-319-15 which permits additional patrons to be carried with the consent of the first passenger.[3] Fifty percent of petitioners' business was derived from its "shared-ride" service [M.G. 28, App. M, p.A-84], and the District Court explicitly found that such shared-ride service constituted "a substantial portion of Westport Taxi's business. [App. A, p.A-2]."

The Transit District's project provides essentially the same services as were offered by petitioners' taxi service. These services are centrally radio dispatched, door-to-door taxi service for one or more passengers at any given time. The Transit District's taxis, however, do not require the permission of the first passenger to take on additional passengers.

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[2] The petitioners suspended operation as a taxi service on May 6, 1978, during the remaining period of the operation of the Westport Transit District's Taxi Service.

[3] The regulation provides:
Sec. 16-319-15, **Order of Service.**
The operator of a taxicab shall accommodate patrons in the order of their application for service. Consent of the first patron hiring the taxicab shall be obtained if additional patrons are to be carried.

The District's municipal taxi service was designed to compete directly with petitioners' business, offering equivalent taxi service at identical locations throughout Westport, with a greater number of taxis than were previously offered by Westport's two then-existing private taxi companies combined. [R.B. 30-37, 45, App. L, p.A-77-A-80]. Directors of the project estimated annual revenue for the two demonstration years at $127,000.00 and $182,000.00 respectively [R.B. 37, App. L, p.A-78], and acknowledged at the time of the hearing below that the Westport area generated only $200,000.00 per year in taxi revenues for both existing companies. [R.B. 38, App. L, p.A-78].[4]

The $610,000.00 federal demonstration grant was utilized to purchase eleven new twelve-passenger taxi vans ("Maxi-taxis") at a cost of over $150,000.00, the balance being utilized to pay operating expenses. The fare structure established by the Transit District was less than petitioners, and, were it not for the federal subsidies, the District would operate at a substantial loss. The rates of the Transit District are not subject to any state regulation, whereas petitioners' rates are controlled by the Connecticut Public Utilities Control Authority. Petitioners have not sought a rate increase since 1970 [M.G. 12, App. M, p.A-83.]

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[4] The grant sought by the District and approved by UMTA was for a two-year demonstration project, authorized pursuant to §1605 of the Act. Although the project was, thus, "officially" of limited duration, the Transit District made clear its intention to continue the project beyond the two-year demonstration period. Projections for a third year of service were included in the application [R.B. 54, App. L, p.A-81], and the District anticipated the project will be continued and expanded after the two-year period, with additional government subsidies, if necessary, [R.B. 53-54, App. L, p.A-81].

Petitioners' profit structure has been marginal for several years [M.G. 12, App. M, p.A-83], showing a small loss in the past two or three years after family salaries were deducted [M.G. 45-46 App. M, p.A-86]. The Gilbertie brothers have, for the past four years, been required to work seventy-five hours per week, drawing salaries of $10,500.00 each in 1975 [M.G. 42, App. M, p.A-85]. The Gilberties' eighty-one year old father worked full-time as a dispatcher for the company at the time of the district court hearing and drew one-half the salary of his sons [M.G. 29, App. M, p.A-82].

B. NATURE OF THE PROCEEDINGS

Petitioners initiated this action on December 6, 1976 in United States District Court for the District of Connecticut, seeking a preliminary and permanent injunction, a declaratory judgment, and other adequate relief based on the failure of the Secretary of Transportation and the Westport Transit District to comply with the mandatory requirements of §1602(d) and §1602(e) of the Act.

At the time suit was commenced, no formal agreement had been executed between the Secretary of Transportation and the Westport Transit District for appropriation of UMTA funds, nor had any vehicles or equipment been delivered to the District.

Petitioners' motion for temporary relief restraining the appropriation was denied on December 9, 1976, after a chambers conference, the court, Newman, J.,

concluding that no imminent irreparable harm mandated issuance of a temporary order. A prompt hearing on petitioners' request for preliminary relief was scheduled for January 11, 1977. On December 16, 1976, respondents executed a formal agreement for the appropriation. Thereafter, a hearing was held on January 11 and 12, 1977, at which the parties agreed that the evidence presented would also serve as the basis for a ruling on petitioners' request for permanent injunctive relief.

On March 29, 1977, petitioners, concerned by published reports that implementation of the project was imminent, reapplied for a temporary order to enjoin the project. The motion was again denied on April 5, 1977, the court indicating it would rule on the case prior to the announced April 16, 1977, starting date of the project.

On April 13, 1977, three days before commencement of the project, the district court denied petitioners' requests for preliminary and permanent injunctive relief. Judgment was rendered on April 18, 1977, and petitioners appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals heard argument on October 5, 1977 and rendered its decision on January 24, 1978, reversing the district court in part, affirming in part and remanding with instructions.[6] Petitioners' motion for a rehearing was denied on February 28, 1978.

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[6] Subsequent to the decision of the court of appeals, UMTA complied with the court's mandate in that it made the findings required under §1602(d) of the Act.

REASONS FOR GRANTING THE WRIT

This petition raises the question whether the provisions of Section 1602(e) of the Urban Mass Transportation Act of 1964 which protects "mass transportation companies" against federally subsidized competition are applicable to petitioners' small private taxi company.

The court of appeals (Meskill, J.) held that petitioners' company, which operated five taxi cabs on a "shared-ride" basis, did not come within the purview of the definition of "mass transportation."

It is petitioners' contention that the court of appeals' decision, which substantially restricts the statutory definition of "mass transportation," does not comport with Congress' expressed intent in two significant respects. First, Congress broadened the narrower definition of "mass transportation" in 1968 so as to allow the study, funding and protection of more extensive and innovative forms of transportation modes and systems which had previously been limited to fixed-route systems in the original 1964 definition. Secondly, the Urban Mass Transportation Act was conceived to provide federal funding for use by state and local bodies to improve the quality of mass transportation systems throughout the United States. The Act was not designed to promote public ownership of transit systems, but rather to "help existing private companies to remain in business and to improve the transportation services they offer." S. Rep. No. 82-83, 88th Cong., 2d Sess. See H.R. Rep. No. 204, 88th Cong., 2d Sess., reprinted in [1964] U.S. Cong. Code and Admin. News p. 2584.

a. THE DEFINITION OF "MASS TRANSPORTATION" WAS BROADENED TO INCLUDE THE PETITIONERS.

The original definition of "mass transportation" enacted by Congress when the Act was administered by the Department of Housing and Urban Development was limited to transportation traveling over prescribed routes:

> (5) the term "mass transportation" means transportation by bus or rail or other conveyance, either publicly or privately owned, serving the general public (but not including school buses or charter or sightseeing service) and moving over prescribed routes.
>
> Pub. L. No. 88-365, §9(d)(5), 78 Stat. 302, 307 (1964). [49 U.S.C. §1608(c)(5), Rev. of 1964]

In 1968, approximately one month after Congress created the Department of Urban Mass Transportation within the Department of Transportation to administer the Act, it enlarged the scope and concept of the functions and systems included in "mass transportation" by substantially broadening the definition to its current form. The present definition eliminates any requirement that vehicles or systems move over prescribed routes and substituted the more general requirement that the transportation system be operated on "a regular and continuing basis:"

> (5) the term "mass transportation" means transportation by bus, rail or other conveyance, either publicly or privately owned, which provides to the public general or special service (but not including school buses or

charter or sightseeing service) on a regular and continuing basis.

Pub. L. No. 90-448, §702, 82 Stat. 476, 535 (1968); 49 U.S.C. §1608(c)(5), as amended.

The court of appeals' conclusion that Congress did not intend the amended definition to apply to conventional taxi service, *Westport Taxi Serv., Inc.* v. *Adams* 571 F.2d 697, 702 (1978), is unsupported by legislative history and ignores the express legislative goal to allow UMTA to explore all areas of urban mass transportation development. The stated congressional purpose of the change was, "to allow greater flexibility in developing and applying new concepts and systems in urban mass transportation programs." S. Rep. No. 90-1123, 90th Cong., 2d Sess. 76-77; see H.R. Rep. No. 1585, 90th Cong., 2d Sess. 65-66, reprinted in [1968] U.S. Code Cong. & Admin. News, pp. 2873, 2940-41. The court expressly recognized that the present definition would include petitioners' company, but found that the petitioners' taxi service was not a "new" concept and thus not encompassed within the definition. *Id.*

The court's decision is inconsistent in that on the one hand petitioners' five-cab "shared-ride" company is held not a "mass transportation" company, while on the other hand the court approved federal funding of a municipal eleven-cab, shared-ride taxi company which provides the same service and by definition is required to be a "mass transportation" company to receive funds under the Act. *Id.*, at 701-2.

There is nothing contained in the amended definition of "mass transportation" nor in its legislative history which would give substance for the creation of

any distinction between the "shared-ride" service of the municipal taxi service and the "shared-ride" service provided by petitioners upon consent of the first passenger.

At the time of the hearing, petitioners were operating their five taxi cabs under a Public Utilities Control Authority Certificate which allowed them to carry more than one passenger going to different locations if they obtained the consent of the first passenger.[7] Petitioners' "shared-ride" service comprised fifty percent of the company's taxi business, [M.G. 28, App. M, p. 84] Its taxis were radio dispatched to the customers' homes, and it also performed pick-ups at central locations within Westport. Respondent Westport Transit District operates its eleven taxi cabs in the same manner, in that its radio dispatched cabs also pick up and deliver door-to-door. The only difference between the two services is that the Transit District need not get the permission of the first rider. However, the Transit District's taxis respond to all calls and thus at times operate for the benefit of only one passenger.

Respondents contended below that petitioners were not providing mass transportation because petitioners, under state regulation, were required to gain the permission of the first passenger before carrying further passengers. Petitioners' response is simply that it is a "mass transportation" company because fifty percent of its business was, in fact, on a shared multiple ride basis.

The Urban Mass Transit Administration is providing a "mass transportation" grant to the Westport

[7] See n.3, *supra.*

Transit District to provide door-to-door, radio dispatched, shared-ride taxi service within the Town of Westport. These were essentially the same services provided by Westport Taxi. Thus, if the federal funding of a municipal shared-ride taxi service is permitted under the Act as "mass transportation," then as a required corollary the protection of the Act must be extended to petitioners' private shared-ride taxi service. It was not Congress' intent to define "mass transportation" differently as to the criterion for grant as opposed to the criterion of protection of private companies.

If the court of appeals' interpretation of "mass transportation" is allowed to stand, the entire taxi industry of major cities such as New York City, which operates on an exclusive ride basis and carries thousands of passengers a day as a integral part of the nation's mass transportation system, would not be entitled to protection from federally subsidized, competitive public taxi services. Equally important, since, under the Act, UMTA assistance is limited to "mass transportation" projects, such taxi service could not be made subject of federal study or funding. Such a result is clearly contrary to the congressional intent.

The court of appeals ruled that although petitioners' exclusive and shared-ride services would seem to come within the statutory definition of "mass transportation," a contrary UMTA interpretation, contained in an adversary affidavit submitted during the course of this litigation, should prevail. The court relied heavily upon a purported agency interpretation of "mass transportation" excluding petitioners' premium and shared-ride services, from the definition of

"mass transportation," as contained in an affidavit prepared for the purpose of this litigation by UMTA official Charles F. Bingham. This affidavit [App. J] purports to make a distinction between petitioners' shared-ride service with permission of the first passenger and the municipal transit district's shared-ride service.[8]

While petitioners recognize the general rule that such an administrative interpretation is entitled to special weight, the law is clear that no such consideration need be given to the views of an administrator adopted during the course of adversary litigation if such views are inconsistent with prior administrative

[8] In his affidavit, Bingham alleged:

> UMTA has consistently included within [the] definition [of mass transportation] any form of collective transportation service which is regularly available to the public, i.e., any service which cannot be reserved for the private and for the private and exclusive use of particular individuals or private groups (certified copies of official correspondence expressing this interpretation are submitted as Exhibits "C" and "E" and made part of this Affidavit). Hence, fixed-route bus or rail services and paratransit services such as dial-a-ride, jitney, shared-ride taxi, neighborhood transit, subscription bus service and other types of shared-ride transportation services which are available to the public or to special categories of users (such as elderly and handicapped persons) on a regular basis are considered by UMTA to be "mass transportation services." Services which can be reserved for the exclusive use of individuals or private groups, either by the operator or the first patron's refusal to permit others to be picked up, such as exclusive-ride taxi service, charter services, sightseeing services, employer vanpool programs, car rental services, for-hire limousines and private ambulance service are not deemed to be "mass transportation" services for purposes of the UMTA Act.

positions. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858 n.25 (1975); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

In the case at bar, exactly such a situation exists. The trial affidavit submitted by UMTA and relied upon by the court of appeals is flatly contradicted by UMTA's earlier policy statements and practice followed prior to institution of this litigation.[9] Thus, for example, UMTA's policy statement on paratransit services, published in the Code of Federal Regulations, specifically recognizes that private taxi companies fall within the protections of §1602(e):

> PROTECTION OF EXISTING PRIVATE OPERATORS
>
> Provision of paratransit service will often be carried out most efficiently and effectively by private transportation companies. It is in the public interest not to foreclose private operators from engaging in the provision of paratransit services where such private operators are willing and able to provide this service. Pursuant to this policy and to Section 3(e) [§1602(e)] and 4(a) [1602a] of the Act, UMTA will not provide financial assistance to any publicly-owned mass transportation company or private non-profit organization for the purpose of operating paratransit services in competition with paratransit services proposed or already being provided by an existing local taxi operator or other private transportation provider, unless it finds that the officially-developed local transportation program provides to the maximum extent feasible for the participation of private transportation companies (whether or not such companies are providing at the time mass transportation services). [App. F, p. A-41-A-47 (*See* C.F.R. 46412, 46413)]

Significantly, the language of this policy statement is plainly drawn from §1602e, inserting the phrase " existing local taxi operator" for the statutory phrase "mass transportation company."

The position expressed in UMTA's policy statement was reiterated in a letter of July 12, 1976 (prior to institution of this action) by Robert E. Patricelli, Administrator of UMTA, to Bill R. Stokes, Executive Director of the American Public Transit Association, in which Patricelli stated:

> [S]pecifically, local taxi operators and other private carriers (whether or not they are currently providing mass transportation services) must be afforded a fair and timely opportunity to participate in the planning of community-level paratransit services and special services for elderly and handicapped persons developed pursuant to DOT Regulations for Transportation for Elderly and

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[9] In the district court proceedings, in response to the government's submission of Bingham's affidavit, petitioners moved to depose Charles F. Bingham and James Bautz of UMTA to establish UMTA policy and past practice in interpreting §1602e. The federal defendant moved for a protective order quashing the notice of deposition, and this motion was granted by the district court on January 11, 1977. The ground, inter alia, cited by the government in its Motion to Quash was that the depositions were "unnecessary for a resolution of the issues of this case." [*See* Record, Dist. Ct Proceedings, Jan. 11, 1977 (order granting motion for protective order)]

The district court did not attempt to resolve the factual issue of UMTA's actual policy because of its determination of the issues against petitioners on grounds held erroneous by the court of appeals.

> Handicapped Persons (49 CFR 613.204). Local private carriers must also be given an opportunity to recommend the inclusion of private paratransit services in the annual element of the Transportation Improvement Program.
>
> Local taxi operators and other private carriers (whether or not they are currently providing mass transportation services) must be afforded full opportunity to bid for the provision of any general or special paratransit services proposed for implementation with the assistance of Federal Funds.

Patricelli specifically noted that compliance with this policy would be accomplished through the §1602 review procedures:

> Compliance with the above policy will be ensured by UMTA through a review of the annual element of the Transportation Program, and of individual paratransit project applications for Section 3[§1602], 5 and 16(b) grants. [App. E, p. A-37-A-40]

The policy statement was also repeated verbatim in an article by C. Kenneth Orski, Associate Administrator for Policy and Program Development of UMTA, written for a taxi trade magazine, *Taxicab Management*, "UMTA's View of the Role of Taxicabs in Public Transportation," p. 1, 13 (November 1976) [App. G, p. A-48-A-56].

James Bautz, head of UMTA's Paratransit Demonstrations Divisions and liason with the taxicab industry, has similarly made clear that

> ". . . local taxi operators and other private carriers must be afforded a fair and timely opportunity to participate in the planning of

> community level and special transit service development of the local transportation plan. UMTA will not provide financial assistance to support public paratransit services in competition with similar private services unless honest efforts are made to involve private operators as providers of paratransit services."
>
> Bautz, *Taxicab Management*, "UMTA's Current Involvement with the Taxicab Industry," p. 11, 13 (February 1977) [App. H, p. A-57—A-67]

In analyzing the agency's actual policies, it is significant to note that UMTA has, in fact, in the past given financial assistance under the Act to private taxi companies for exclusive ride services. *Westport Taxi Service, Inc.* v. *Adams, supra*, at 703 n.5. In addition, Bautz' article makes specific reference to numerous projects funded by UMTA involving exclusive as well as shared-ride taxi service, in direct contradiction of Bingham's affidavit. Bautz, *op. cit.*, at p. 161 (*i.e.*, purchase of 66 diesel taxis, funding of feeder service for exclusive ride).

While the court of appeals sought to minimize the extent of this funding, this action by UMTA plainly manifests the inconsistency of its prior administrative interpretation of the Act with that asserted in Bingham's affidavit.

Thus, UMTA's own policies and grants prior to this litigation clearly reveal a policy to protect and deal with private taxi owners and clearly place petitioners within the ambit of §1602(e) of the Act. In view of the unexplained contradiction between Bingham's adver-

sary affidavit and UMTA's past policy and practice, the court of appeals improperly relied upon Bingham's affidavit. *United Housing Foundation, Inc.* v. *Forman, supra.*

In viewing the agency policies, it must also be noted that the jurisdiction and authority of the Urban Mass Transportation Administration are limited and controlled by the definition of "mass transportation." The agency has taken the position that it has wide ranging authority to fund and study forms of transportation which are not usually conceived as mass transportation. Thus, the agency, in its administrative role, has in practice asserted broad authority over diverse forms of transportation. It is estopped from now attempting to limit its interpretation of "mass transportation" in determining which companies should receive the benefits of the Act's protections.

b. THE ACT WAS DESIGNED TO PROTECT PRIVATE ENTERPRISE TAXI COMPANIES AGAINST UNLAWFUL FEDERALLY FUNDED COMPETITION.

It is petitioners' position that the definition of mass transportation is clearly intended to promote the development of systems which foster the continuation of private taxi companies like petitioners'.

The legislative history of the Act indicates that Congress clearly intended to assist private enterprise to continue to operate in the mass transportation field and to protect private transportation companies against destruction resulting from competitive federal

funding.[10] The Act was designed not to promote public ownership of transit systems but, rather, to, "help existing private companies to stay in business and to improve the transportation services they offer." S. Rep. and H. Rep. 88th Cong. 2nd Sess., *supra*, at 2584.

I.T.N.10

This purpose is well revealed by the legislative history:

In order to insure the maximum participation of existing private transit companies in federal projects and compensation to such companies for any federally-funded acquisition of their property or franchise interests, Congress carefully specified that, "[n]o financial assistance shall be provided under this Act" for a project that competes with an existing mass transportation company, unless the Secretary of Transportation finds that the proposed project will (1) insure the maximum participation of existing companies in the project and (2) provide adequate compensation, under applicable state or local law, for any taking of equipment or franchise interests occurring as a result of the project. 49 U.S.C. §1602e.

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[10] This purpose is well revealed by the legislative history:

> With respect to public ownership and operation the committee believes that existing private companies will be acquired in only a few cases. It has been pointed out that existing private transportation companies are to participate in the assistance provided by this bill. It is not the intent of this legislation to promote public ownership of urban transportation systems, or to eliminate or curtail collective bargaining rights. S. Rep. and H. Rep. 88th Cong. 2nd Sess., *supra*, 2583
>
> Mass transit facilities and equipment already being used in the urban area could be acquired only if the program provides for their improvement so that they will

The Secretary's failure to make the findings required by §1602e prior to approving the Westport Transit District grant reflects more than a mere technical violation of the Act. Contrary to the legislative goal of improving existing private transit service, the District's application for UMTA funding, as approved by UMTA, explicitly indicated the District's intention to eliminate the two private taxi companies in Westport and establish, in their place, under the control and supervision of the Transit District, a new municipal taxi company [*See* Record, Application of Westport Transit District for UMTA grant, January 31, 1976, pp. A-19-22].

While, under the proposal, it was conceived that the Gilberties would be employed as dispatchers [*id.*, at A-19-20], they would have been required to surrender their corporate identity and independence. The District, not petitioners, would own all vehicles, would be responsible for establishing routes, salaries and fare structures, and would collect and control revenues. The petitioners' private taxi company would cease to exist, and petitioners, independent businessmen for the past 22 years, would become employees of the Transit District.

Furthermore, in the event that petitioners attempted to continue private taxi operations, the District's application explicitly provided for elimination of petitioners' present franchise right to provide shared-ride service.[11] Although such service constitutes a "substantial portion of Westport Taxi's

better serve the transportation needs of the area. *Id.*, at 2586.

[11] *See* Record, Application of Westport Transit District for UMTA grant January 31, 1976, p. B-2.

Under existing Connecticut P.U.C.A. regulations [§16-319-15], petitioners are permitted to provide shared-ride service with the consent of the first passenger.

business" [App. A, p. A-4], furnishing over fifty per cent of petitioners' revenue [M.G. 22, App. M, p. A-83], no provision was made for compensation to petitioners for the taking of this part of their franchise or for the inevitable decrease in their revenue. Contrary to the requirements of 1602e(3), state laws applicable to acquisition by a transit district of franchise interests were not followed. See 7-273e, Connecticut General Statutes. Rather, under the proposal, petitioners were simply to be left with diminished rights of service and diminished compensation, with the inevitable result that petitioners would be put out of business. [M.G. 22, App. M, p. A-83] See *Westport Taxi Serv., Inc.* v. *Adams, supra.*, at 700.

Such public ownership and control of Westport's transit services and the concommitant elimination of the existing private operators as independent transit entities are precisely contrary to the stated goals of the Act to promote and improve existing private transit companies and to limit public assumption of transit service. The Act requires the maximum participation of private transit companies so that, through federal funding, such companies will ultimately be able to provide full service without subsidy, seeking to insure that transit services continue to be provided by existing private, rather than new public entities. The Act is completely frustrated if existing private companies are effectively eliminated by a superseding public entity, even if the management and staff of the private companies are offered employment by the municipality. As Congress explicitly noted:

> [I]t is not the intent of this legislation to promote public ownership of urban

> transportation systems. . . . The bill would help existing private companies to remain in business and to improve the transportation systems they offer. S. Rep. No. 82-83, 88th Cong., 2d Sess., see H.R. Rep. No. 1585, 88th Cong., 2d Sess., reprinted in [1964] U.S. Cong. Code and Admin. News pp. 2583-2584.

Petitioners thus sought in the district court to enjoin the Transit District and its directors from implementing the proposed project, contending that such direct competition with petitioners' business by local authorities acting under color of law constituted an infringement and taking of the property interest inherent to petitioners' state taxi franchise, in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Although recongnizing the general proposition that there is no constitutional right to be free from lawful governmental competition, *Tennessee Electric Power Co.* v. *TVA*, 306 U.S. 118 (1939); but *compare Frost* v. *Corporation Commisson*, 278 U.S. 515 (1929); *see Wells Fargo Armored Service Corp.* v. *George Public Service Commission*, 547 F.2d 938, 940 n.2 (5th Cir. 1977), petitioners contended that §1602(e) of the Act confers upon them a federal statutory right, enforceable through 42 U.S.C. §1983, to be free from UMTA-funded competitive taxi sevices absent compliance with §1602(e) of the Act. *See Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968).

In *Hardin* v. *Kentucky Utilities Co., supra*, this Court held that Congress may enact statutes creating legal rights, the invasion of which is judicially reviewable, even though no protected interest would exist without the statute. In *Hardin*, the right created was a public utility's right, under the Tennessee Valley Authority Act, to be free from competition by the Authority in areas prohibited by the Act. Although the Court ultimately rejected the utility's interpretation of the areas in which the Authority could lawfully compete, the Court made clear that had the Authority competed improperly, injunctive relief would lie.

Since *Hardin*, the Court has also made clear that interference by state or local officials with a federally created statutory right may be enjoined under the Civil Rights Act, 42 U.S.C. §1983, invoked by petitioners below. *O'Shea* v. *Littleton*, 414 U.S. 488, 492 n.2 1974; *cf.*, *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972). There is similarly no question that petitioners' attempt to enjoin the deprivation, without compensation, of a federally protected property interest by local authorities acting under court of law is cognizable under the Civil Rights Act. *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 552 (1972).

The court of appeals declined to find the existence of any federal statutory right conferred upon petitioners by §1602(e) because of its conclusion that petitioners' company is not a "mass transportation company" and thus is not protected by the statute. Because, for the reasons stated above, that conclusion was erroneous, the court of appeals also erred in concluding that no federal statutory right existed, and its opinion must be overturned.

CONCLUSION

The definiton of "mass transportation" and its legislative history give UMTA wide latitude in funding transportation programs and services. However, this

wide latitude also imposes on the agency the requirement to protect private taxi companies that are rendering the same types of transportation services as those federally funded under the Act.

UMTA has failed to fulfill its obligations under the Act to protect and promote existing private transit companies in the Westport area. The holding of the court of appeals approving UMTA's actions threatens not only the existence of petitioners' business, but the continued vitality, under the Act, of private taxi companies throughout the nation. The court of appeals' holding takes on extreme importance, especially in light of UMTA's stated intention to fund para-transit projects involving taxi services throughout the country. [App. F, p. A-46] The purpose of the Act was to improve the private transportation sector, not to put the government in the taxi business.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

We, Richard A. Silver and David S. Golub, Attorneys for the Petitioners, certify that a copy of the foregoing Petition was mailed, via U. S. Mail, postage prepaid, this 26th day of May, 1978, to the following attorneys of record: U. S. Attorney, 20 Orange Street, New Haven, Connecticut 06508; Glenn F. Wasserman, Attorney Advisor, Urban Mass Transportation Administration, 407th Street, S.W. Washington, D.C. 20590; Richard Berkowitz, Esquire, 136 Main Street, Westport, Connecticut; J. Daniel Sagarin, Esquire, 855 Main Street, Bridgeport, Connecticut.

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